

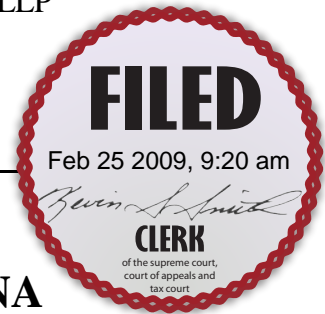
Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

KURT A. WEBBER
Kurt A. Webber, P.C.
Carmel, Indiana

ATTORNEYS FOR APPELLEE:

WENDY D. BREWER
PAUL L. JEFFERSON
KRISTA STEINMETZ ZORILLA
Barnes & Thornburg LLP
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

HOME BANK S.B..

Appellant-Defendant/Cross-Appellee,

VS.

U.S. BANK NATIONAL ASSOCIATION,
assignee of FRANCHISE MORTGAGE
ACCEPTANCE COMPANY, LLC,

Appellee-Plaintiff/Cross-Appellant.

No. 55A01-0804-CV-202

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable Christopher L. Burnham, Judge
Cause No. 55D02-0608-MF-253

February 25, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

CRONE, Judge

Home Bank S.B. (“Home Bank”), appeals the trial court’s denial of its motion for summary judgment and its granting of U.S. Bank National Association’s (“U.S. Bank”) motion for dismissal without prejudice. U.S. Bank cross-appeals the trial court’s denial of its motion for summary judgment. We reverse the trial court’s order of dismissal without prejudice and remand.¹

The parties dispute their respective interests in a piece of real estate located at 675 West Southview Drive, Martinsville. U.S. Bank holds a mortgage on the Southview Drive property that was recorded in June 1997. An easement recorded in 2006 grants an adjacent parcel of land known as 2237 Burton Lane two separate rights-of-way and the right to place a sign on the Southview Drive property. Home Bank is the current holder of a mortgage on the Burton Lane property and contends that its interest extends to the easement. There is no evidence that U.S. Bank consented to the easement or agreed to subordinate its mortgage to the easement.

On August 4, 2006, U.S. Bank initiated this action, alleging that its mortgage lien on the Southview Drive property is superior to the lien held by Home Bank and asking the trial court to foreclose Home Bank’s “junior lien[.]” Appellant’s App. at 19. On October 19, 2006, U.S. Bank filed a motion for summary judgment. On November 15, 2006, Home Bank filed an answer and counterclaim along with its own motion for summary judgment. Home Bank claims that the easement is valid because when it was recorded, Home Bank did not

¹ On January 20, 2009, we held oral argument on the issue of jurisdiction. We thank counsel for their excellent presentations and for their subsequent written submissions.

have actual notice of U.S. Bank's mortgage. Home Bank also claims that U.S. Bank's mortgage was not properly executed or acknowledged and thus failed to serve as constructive notice. Home Bank asked the trial court to enter a declaratory judgment that the U.S. Bank mortgage is void and unenforceable against Home Bank. U.S. Bank filed a response which included the affidavit of Kathleen A. Bray, the notary public who had acknowledged the 1997 U.S. Bank mortgage. On March 13, 2007, following a hearing, the trial court granted Home Bank's motion to strike Bray's affidavit and denied both parties' motions for summary judgment.

The matter was set for trial on March 25, 2008. Prior to trial, U.S. Bank filed another motion for summary judgment, to which Home Bank filed a response. On the morning of trial, the trial court denied U.S. Bank's second motion for summary judgment and its oral motion for continuance. U.S. Bank then moved to dismiss the action without prejudice, explaining that legislative amendments to be enacted July 1, 2008, would clearly bolster its claim that the U.S. Bank mortgage, even if improperly acknowledged, served as constructive notice to Home Bank. Over Home Bank's objection, the trial court granted the motion to dismiss without prejudice.

On appeal, Home Bank argues that the trial court erred in denying its motion for summary judgment and that the trial court erred in granting U.S. Bank's motion to dismiss without prejudice. On cross-appeal, U.S. Bank alleges that the trial court erred in denying its motion for summary judgment.

Indiana Trial Rule 41(A)(2) addresses voluntary dismissals by order of the court,

stating as follows:

Except as provided in subsection (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim or cross-claim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim or cross-claim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice.

In its dismissal order, the trial court stated in pertinent part: "The Court being duly advised in the premises now grants said motion and orders that these proceedings be dismissed, without prejudice. ... Case disposed." *Id.* at 15. Pursuant to Indiana Trial Rule 41(A)(2), it was within the trial court's discretion to dismiss U.S. Bank's complaint, but it erred by also dismissing Home Bank's counterclaim because the counterclaim was filed before U.S. Bank made its motion to dismiss, and because it can remain pending for independent adjudication. Thus, we hereby reverse the trial court's dismissal order and remand for reinstatement of Home Bank's counterclaim.

As mentioned above, both parties appeal the trial court's denial of their summary judgment motions. Each party could have initiated a timely interlocutory appeal of the order, but both failed to do so. *See* Ind. Appellate rule 14(B). As such, they are now limited to appealing the summary judgment orders upon the entry of the trial court's final judgment in this case, if one is in fact entered. *See Bojrab v. Bojrab*, 810 N.E.2d 1008, 1014 (Ind. 2004) ("A claimed error in an interlocutory order is not waived for failure to take an interlocutory appeal but may be raised on appeal from the final judgment."); *see also Four Seasons Mfg.*,

Inc. v. 1001 Coliseum, LLC, 870 N.E.2d 494, 501 (Ind. Ct. App. 2007) (noting that party who fails to bring interlocutory appeal from denial of motion for summary judgment may still pursue appeal after entry of final judgment because denial of summary judgment simply places parties' rights in abeyance pending ultimate determination by trier of fact). For these reasons, we have no jurisdiction over Home Bank's appeal of the denial of its motion for summary judgment or U.S. Bank's cross-appeal regarding the trial court's denial of its motion for summary judgment. We hereby dismiss those claims for lack of jurisdiction.

Reversed in part and remanded, dismissed in part.²

ROBB, J., and BROWN, J., concur.

² On January 5, 2009, Home Bank filed a motion to strike portions of U.S. Bank's reply brief. On January 23, 2009, U.S. Bank filed a response. In these pleadings, the parties dispute whether certain title search information is properly before this Court. This is information that would be relevant only to a review of the trial court's summary judgment rulings; thus, we need not address the motion and response.